

No. 87-99

Supreme Court, U.S.

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JOSEPH F. SPANIOL, JR.

In the Supreme Court of the United States

OCTOBER TERM, 1987

LYVONNE G. ARCHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the absence of an instruction permitting the court-martial panel to infer that petitioner's use of marijuana was "wrongful" shifted the burden of proof on that element of the offense from the government to petitioner.

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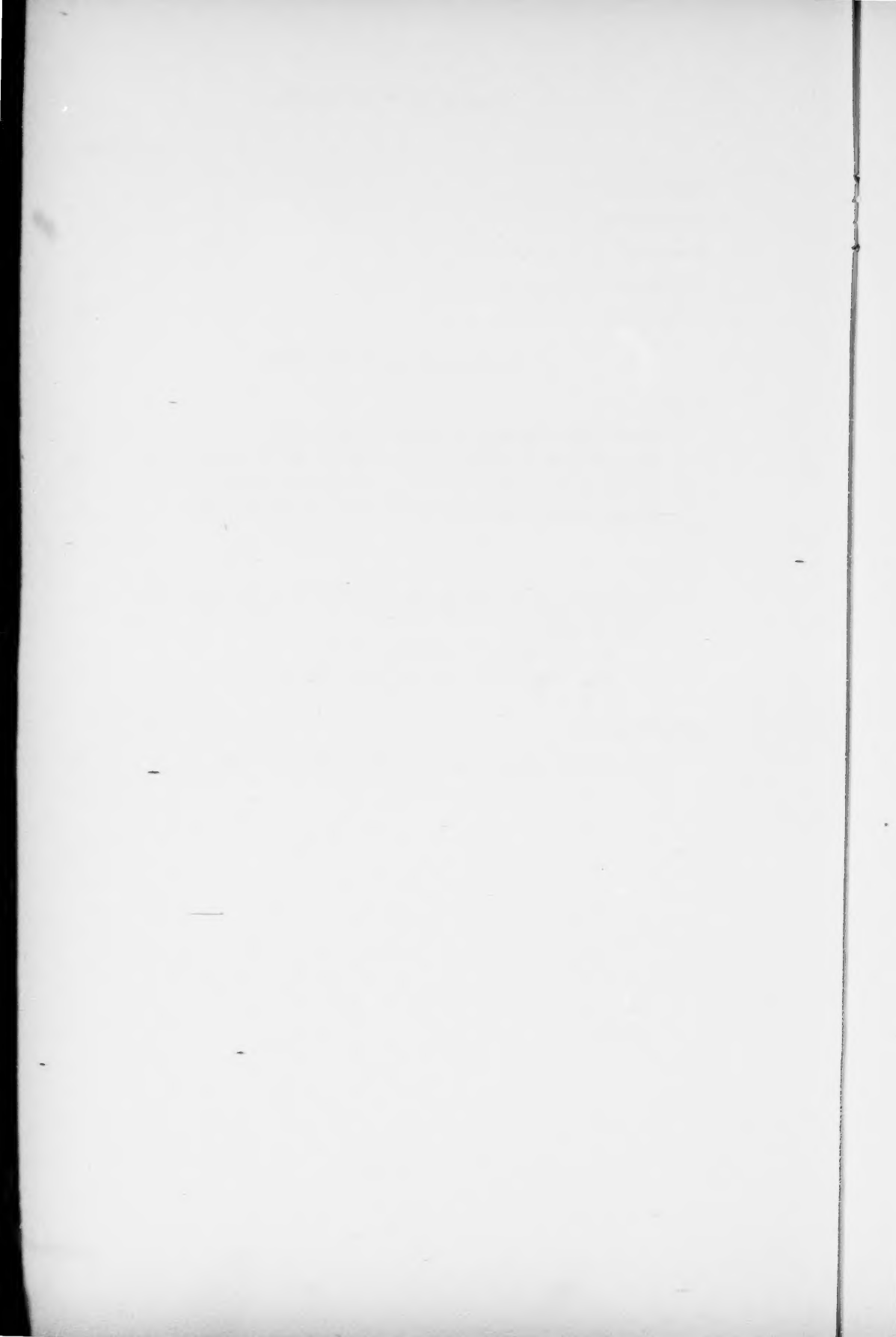
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OPINIONS BELOW

The order of the Court of Military Appeals (Pet. App. 1a) is reported at 24 M.J. 30. The opinion of the Army Court of Military Review is unreported (Pet. App. 2a-3a).

JURISDICTION

The judgment of the Court of Military Appeals was entered on May 20, 1987. The petition for a writ of certiorari was filed on July 17, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. III) 1259(3).

STATEMENT

Petitioner, a member of the United States Army, was tried by a special court-martial at Fort Bragg, North Carolina. Petitioner was convicted of the wrongful use of marijuana, in violation of Article 112a of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. (Supp. III) 912a. She was sentenced to a bad conduct discharge. The convening authority reviewed the case pursuant to Article 60, UCMJ, 10 U.S.C. (& Supp. III) 860, and approved the

sentence. The Army Court of Military Review affirmed the findings and sentence (Pet. App. 2a-3a). The Court of Military Appeals summarily affirmed (Pet. App. 1a).

1. Petitioner was found guilty based on the result of a urinalysis test conducted on December 18, 1984 (Tr. 73).¹ Petitioner tested positive for tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana (GX 1). The test result, a stipulation of fact regarding the chain of custody and the integrity of the positive test result, and expert testimony (offered in rebuttal) supporting the scientific reliability of the urinalysis test, were presented at trial (GXs 1, 2; Tr. 253-303). Petitioner's defense consisted of lay and expert testimony in support of her claim of passive inhalation (Tr. 102-147, 149-184, 187-204).² The prosecution rebutted petitioner's passive inhalation claim with the testimony of Doctor Mary Jo Fyfe, an expert in pharmacology from CompuChem Laboratories.³ She discussed the theory of passive inhalation and stated that it was "highly unlikely" that petitioner's positive test result was attributable to passive inhalation (Tr. 270).

¹ Petitioner was also charged with the use of marijuana on another occasion, based on the testimony of a soldier who claimed to have seen her smoking a marijuana cigarette (Tr. 78-96). Petitioner was found not guilty of that charge.

² Several neighbors and relatives testified that over the weekend immediately prior to the urinalysis test petitioner visited her mother, and that everyone but petitioner smoked marijuana (Tr. 149-184, 187-204). Petitioner's expert, Doctor Arthur J. McBay, offered testimony based on a hypothetical situation similar to the fact pattern presented by petitioner's defense. Dr. McBay stated that it was "possible" that passive inhalation could account for the positive test result (Tr. 115-116). Petitioner also presented evidence of her good military character (Tr. 214-215, 221-222).

³ CompuChem Laboratories performed the test on petitioner's urine.

2. The trial judge instructed the members as follows (Tr. 344-347):

The burden of proof is upon the prosecution to establish that the use of marijuana was wrongful. If the accused, at the time of the alleged offense—and this goes to the Charge, okay; this is the charge concerning the evidence where passive inhalation was received. If the accused, at the time of the alleged offense unknowingly inhaled a substance which produced a positive urine test, she cannot be found guilty of the offense charged, wrongful use of marihuana. Further, the accused's mere presence at the time others are committing a crime, such as smoking marihuana, or her failure to prevent commission of the offense, is not sufficient to find her guilty of use of marihuana; nor is the accused's failure to report others sufficient to find her guilty of the use of marihuana. I advise you further that to find the accused guilty of the offense of use of marihuana, you must find, beyond a reasonable doubt, that the accused knowingly and consciously used marihuana. Do you understand that? (Affirmative response by all members).

* * * * *

You are further advised, first, the accused is presumed to be innocent until her guilt is established by legal and competent evidence beyond a reasonable doubt. Second, if there's a reasonable doubt as to the guilt of the accused, that doubt must be resolved in the favor of the accused and she must be acquitted. Lastly, the burden of proof to establish the guilt of the accused beyond a reasonable doubt is on the government. The burden never shifts to the accused to establish innocence or disprove the facts necessary to establish each element of the offense. * * *

Petitioner did not object to these instructions, nor did she request any additional instructions on the issue of wrongfulness (Tr. 310, 313).

3. The Army Court of Military Review summarily affirmed petitioner's conviction (Pet. App. 2a-3a). Relying on *United States v. Ford*, 23 M.J. 331 (C.M.A. 1987), and *United States v. Murphy*, 23 M.J. 310 (C.M.A. 1987), the Court of Military Appeals also summarily affirmed (Pet. App. 1a).

ARGUMENT

1. Petitioner contends (Pet. 7-9) that the trial judge's failure to instruct the court-martial panel that it could infer that her use of marijuana was wrongful violated the Due Process Clause. Petitioner did not raise that complaint at trial, however, and has therefore waived her claim in the absence of plain error. Rule for Courts-Martial 920(f), *Manual for Courts-Martial, United States—1984* [hereinafter *Manual*]; *United States v. Fisher*, 21 M.J. 327 (C.M.A. 1986) (standard of review for instructional error raised for the first time on appeal is plain error). In any event, petitioner's claim lacks merit. That claim is not materially different from one of the claims presented in *Tedder v. United States*, No. 86-1934. For the reasons given in our brief in opposition in that case,⁴ further review of petitioner's claim is not warranted.

⁴ We have provided petitioner's counsel with a copy of our brief in *Tedder*. Here, as in *Tedder*, petitioner argues the "‘mystique’ of urinalysis" (Pet. 6) combined with the trial court's failure to give an appropriate instruction on the permissive inference of wrongfulness would have led the jury to conclude that the government had to prove only that she used marijuana, and that her use was also wrongful. That contention is novel, but without substance, since it ignores the correct instructions given by the trial judge. The trial judge made clear that the government bore the burden of proving each element of the charged offense beyond a reasonable doubt, and that wrongfulness

2. Petitioner maintains (Pet. 9-12) that it is irrational to infer that her use of marijuana was wrongful in the absence of direct proof on this issue. Petitioner also argues (Pet. 12-14) that the permissive inference authorized by *Manual* Pt. IV, para. 37c(5) does not apply where, as here, the defendant has rebutted the inference by offering evidence that her use of marijuana was innocent. Those contentions are not materially different from the claims presented in the petition in *Douglas v. United States*, No. 86-1893. For the reasons given in our brief in opposition in that case,⁵ further review of petitioner's claims is not warranted.

was one such element. The trial judge also explained that petitioner must be found not guilty if the panel had a reasonable doubt of her guilt because of her claim that she had innocently inhaled marijuana. The trial judge therefore did not take this issue away from the court-martial panel. In fact, the only mandatory presumption referred to by the trial judge was that petitioner was presumed to be innocent of the crime. Accordingly, no reasonable panel member could have concluded that the government was not required to prove that petitioner's use of marijuana was wrongful. See *Sandstrom v. Montana*, 442 U.S. 510, 514 (1979).

⁵ We have provided petitioner's counsel with a copy of our brief in *Douglas*.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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